

DEATH PENALTY COMMISSION

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TRANSCRIPT OF PROCEEDINGS

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10:10 a.m.

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4 MS. NAPOLITANO: Thanks to everybody for
5 coming on somewhat short notice. The purpose of today's
6 meeting is really one-fold, and that is to discuss what
7 legislation should be tendered to the Arizona Legislature
8 in light of the US Supreme Court's decision in Ring, which
9 was incredibly well-argued by the State, but it didn't
10 turn out that way.

11 What I thought I would do, and what we have
12 tried to get to over the last week, the reason for the
13 somewhat short time frame is that there is some interest
14 in the Legislature of addressing this very expeditiously.
15 In fact, I think both the Speaker and the President,
16 Speaker of the House and President of the Senate, really
17 wanted to go in tomorrow in a special session.

18 I suggested, as well as some of my
19 colleagues, that this required a little more thinking and
20 to make sure that everybody who has a stake in the process
21 had an opportunity to be heard. It seemed to me that this
22 group, which is comprised of so many different stake
23 holders in the process, was a good group to bring together
24 to take comments and thoughts and so forth.

25 Now, this special session has not yet been

1 called, and I don't know when it will be, but my best
2 estimate would be at the end of July or the very beginning
3 of August. I think there is some -- I don't know. You
4 guys have some legislative conferences or things like
5 that. You still going to those?

6 SENATOR SMITH: No. I'm not wrapping on
7 doors. I'm not walking the streets.

8 MS. NAPOLITANO: Is that why you look so
9 happy and relaxed?

10 SENATOR SMITH: I hope to tell you...

11 MS. NAPOLITANO: Trade ya.

12 Anyway, well, so that's three or four weeks
13 from now.

14 Now, also by way of background, the Arizona
15 Prosecuting Attorneys Counsel, APAAC, met last week, and
16 that is comprised of all 15 county attorneys, the Attorney
17 General, and a representative from the Court, which is
18 Dave Buyers (phonetic), who is the Court Administrative
19 Officer, to look at some draft legislation. And we have
20 given you -- and it's marked Draft 3, dated 7/5/02, the
21 most recent form of that legislation that APAAC endorsed.

22 Rather than have you go through all
23 13 pages, I thought I would ask Paul McMurdie, who has
24 been working on the drafting, to come forward and tell you
25 what the issues were that were confronted in the draft and

1 how the draft deals with those issues. Then after Paul
2 makes the presentation, I thought we would open it up to Q
3 and A to him and then see where people are, whether they
4 are comfortable with the draft, whether there are things
5 that need to be added, and we will go from there. So
6 Paul?

7 MR. CARDENAS: Janet, before you begin, I
8 just wanted to note my presence.

9 MS. NAPOLITANO: Thanks, Jose. We are also
10 by way -- we are, as we have done with all capital case
11 commission meetings, having this recorded by a court
12 reporter, and we will get an expedited transcript. So if
13 people want to register agreement, dissent, or what have
14 you, there will be a record of that.

15 MR. McMURDIE: Good morning. The first
16 thing is the APAAC decided to recommend that it be jury
17 sentencing in the purest form and that the jury would
18 decide between the three options available after a
19 conviction of first degree murder. That would be, they
20 would decide between death, natural life, or a life
21 sentence. If the State does not allege that they are
22 going to seek the death penalty, then it would remain with
23 a judge to determine whether it be life or natural life.

24 The aggravating circumstances would remain
25 the same so that there would not be a substantive change

1 in the legislation. So that it could apply retroactively
2 under Dobert (phonetic) versus Florida. The phases of the
3 proceedings would go as there would be a normal trial.

4 At the end of the trial phase, there would
5 be an aggravation phase where the State would prove 1 of
6 the 10 aggravators. If the State proves an aggravator, it
7 would go to the Penalty Phase. At the Penalty Phase,
8 anything in mitigation could be presented.

9 The jury does not have to unanimously agree
10 on mitigation. It's up to each individual juror. That's
11 based on a case out of Maryland, Mills versus Maryland.
12 The jury would then vote to determine which of the three
13 sentences are available.

14 It does require juror unanimity. In the
15 aggravation phase, the jury has to be unanimous concerning
16 the aggravators. If there is a hung jury, if they cannot
17 resolve the issue, it does allow for the jury to be
18 re-impaneled. It's the same with the Penalty Phase. If
19 the jury can't agree on the penalty, again, it's a hung
20 jury, and the jury can be re-impaneled. And I believe
21 that goes through the three --

22 MS. NAPOLITANO: Paul, why don't you walk
23 the commission through what happens if a case is
24 death-noticed and the jury decides not to impose the death
25 penalty. What would happen then?

1 MR. McMURDIE: If the jury decides not to
2 impose the death penalty, then it would go to a judge to
3 determine whether it was natural life or life. So if at
4 some point in time if in the proceedings, they can find no
5 aggravators, then it would go to a judge to impose life or
6 natural life. The same with the penalty phase. If they
7 unanimously agree that death is not the correct option,
8 then it would go to the judge to determine that it was
9 life or natural life.

10 MS. NAPOLITANO: Also for the commission
11 members, I think the basis of this statute of the
12 procedures is based on California, if I'm not mistaken.

13 MR. McMURDIE: That's correct. Most -- the
14 procedure is adopted from the California statutes, as far
15 as the three phases and how it is implemented. Obviously,
16 we adopted our own substantive law to apply into the
17 procedure.

18 MR. HASTINGS: I'm kind of confused. Is
19 there some situation where the jury actually determines to
20 impose life or natural life, or is it just they determine
21 that one of those two are the appropriate punishment, and
22 then it goes to the Judge?

23 MR. McMURDIE: That's correct. They decide
24 whether it's going to be death or life. It's up to the
25 Judge to determine whether it is life or natural life, but

1 they have to be instructed on what would be the life
2 options, even though they wouldn't make the ultimate
3 decision.

4 MS. NAPOLITANO: Paul, could you explain for
5 the commission how this bill would handle victim impact
6 statements.

7 MR. McMURDIE: The bill tracks language that
8 is presently in the law in Arizona, in that Victim Impact
9 Evidence is permitted at the Penalty Phase, but the
10 victims would be instructed that they cannot make a
11 recommendation on the ultimate penalty. That's not
12 appropriate. It can be an audiotaped victim impact
13 statement, a written statement, or it can be actual
14 live -- a live presentation.

15 MS. NAPOLITANO: Harold?

16 MR. HIGGINS: How many other states that
17 have the jury sentencing provided for repeat penalty phase
18 trials for different juries rather than one crack, and if
19 you don't make it, you lose?

20 MR. McMURDIE: There are a number of states
21 that do allow for that. More other states it's just it
22 hasn't been litigated. I'm not sure if that's -- we
23 couldn't find anything in their statute or in the rules or
24 in their case laws. I'm not sure if it just never happens
25 or what is the procedure. There are -- but as I've said,

1 there are several states that have specifically ruled on
2 the issue and said that it can, if it's a hung jury.
3 Other states go the other way. That's obviously something
4 that is up for debate.

5 MR. HIGGINS: So in cases where the
6 aggravating factors in particular depend on evidence
7 presented in trial, we would be essentially looking at
8 retrying the whole case without the new jury determining
9 guilt or innocence; is that correct?

10 MR. McMURDIE: That's correct. Anything
11 that you want to prove in aggravation that came from the
12 trial, if you have impaneled a new jury, that evidence
13 would have to be re-presented.

14 MS. NAPOLITANO: Other questions? Lee?

15 MR. STEIN: Yeah. I note that the
16 Supreme Court review has been changed from the way it
17 currently is. What was the thinking behind that?

18 MR. McMURDIE: Two things. First of all,
19 the independent review is inconsistent with jury
20 sentencing. Also it's a higher standard to say that the
21 person has to find beyond a reasonable doubt that the
22 error that happened below didn't infect the jury's
23 verdict.

24 So actually, what it is, we eliminated the
25 independent review, because we believed it was

1 inconsistent with jury sentencing and specifically put in
2 a higher standard that that was the standard that they
3 would have to review in deciding it once they found error.

4 MR. JOHNS: Paul, what is the thinking on
5 the audiotaped statements? They are going to be
6 introduced at the penalty phase?

7 MR. McMURDIE: Victim impact evidence would
8 be admitted.

9 MR. JOHNS: At the penalty phase?

10 MR. McMURDIE: Correct.

11 MR. JOHNS: What about the right to
12 confrontation?

13 MR. McMURDIE: The right to confrontation
14 does not exist at sentencing.

15 MR. JOHNS: Even though the jury is going to
16 make a determination based on evidence so that the person
17 who is going to be possibly sentenced by the jury has no
18 way to confront those witnesses with what they say?

19 MR. McMURDIE: You don't have a right to
20 cross-examine the victim at sentencing. What you have a
21 right to do is -- it's satisfied, the Defense has an
22 opportunity to explain or deny the information. It would
23 as long as you were given the information beforehand so
24 that you could --

25 MR. JOHNS: What if they have new

1 information that they give on the stand or as they are
2 giving their statement. Would they stop the trial and
3 investigate that?

4 MR. McMURDIE: Obviously, if it was so
5 detrimental, that would be something you could --

6 MR. JOHNS: What is the precedent for that?
7 Is there another state that does that?

8 MR. McMURDIE: Most states do that,
9 especially in light of Payne versus Tennessee.

10 MR. JOHNS: With jury sentencing?

11 MR. McMURDIE: Yes.

12 MR. JOHNS: Do you know of a case?

13 MR. McMURDIE: Payne versus Tennessee.

14 MR. JOHNS: No. Besides that.

15 MR. McMURDIE: Payne is specifically the one
16 that says that they have that right to present victim
17 impact. And then Williams versus New York is the case
18 that says there is no confrontational right at sentencing.
19 Later on they explain Williams to say that it means you
20 have the right to explain or deny evidence. So they can't
21 put on secretive information, but as far as the right to
22 cross-examine or confront in that matter, there is no
23 consistent way.

24 MR. HASTINGS: Just on the same -- on the
25 same line, if the victim takes the stand to testify as

1 opposed to a written or taped statement, is there a right
2 to cross-examine?

3 MR. McMURDIE: There is an Arizona case on
4 point that says that if the victim or anyone testifies,
5 then at that point in time, there was that right. So it
6 would be a due process argument to be made that if the
7 victim subjected themselves to that, it would be up to the
8 discretion of the Court.

9 MS. LELAND: This is Gail Leland from
10 Tucson.

11 MS. NAPOLITANO: Yes, Gail.

12 MS. LELAND: Hi. Sorry I couldn't join in
13 person today. I had a question about that. If the
14 victims want to make the victim impact statement orally,
15 personally, however, they don't really want to be sworn in
16 and use their statement as testimony, there doesn't seem
17 to be any -- sometimes they are sworn in, and sometimes
18 not. It just depends on the judge. I wonder if that can
19 be clarified a little bit more.

20 MS. NAPOLITANO: Paul?

21 MR. McMURDIE: This doesn't substantively
22 change what was already in current statute. There is
23 nothing that would require a victim to be sworn in to give
24 a victim impact statement. There isn't under the current
25 law. That's something that if people believe is important

1 to make that type of distinction, obviously that's
2 something we could address. We just didn't address it in
3 this bill.

4 MS. LELAND: It has been that a couple times
5 that they were sworn in and had no idea why, before or
6 even after the trial, but just so that I'm clear on what
7 we are doing here that if they choose to give a statement
8 orally to the court in person, that doesn't necessarily
9 mean that they are -- would be under the obligation of
10 being cross-examined.

11 MR. McMURDIE: I think Justice Moeller had a
12 question.

13 MS. NAPOLITANO: Justice Moeller?

14 JUSTICE MOELLER: Yes. Paul, I have been
15 under the impression that when Furman came along many
16 years ago that those defendants that were sentenced to
17 death under an unconstitutional scheme at the time of
18 their crime, could not thereafter be sentenced to death.
19 Now, maybe I'm wrong about that. What does your research
20 show about the efficacy in this whole process of enacting
21 a statute years after the fact and then sentencing
22 defendants to death under it when the statute didn't exist
23 at the time of the crime?

24 MR. McMURDIE: Oh, I'm sure John Stookey
25 would want equal time on response, but Dobert versus

1 Florida, that's exactly what happened. The State of
2 Florida had a statute that was declared unconstitutional,
3 but the penalty remained the same. They changed their
4 procedure, and then applied the procedure retroactive to
5 his case, and the Supreme Court said that was okay,
6 because the penalty had not changed -- the ultimate
7 penalty. So the procedure --

8 JUSTICE MOELLER: And when was that case?

9 MR. McMURDIE: That was after Furman.

10 MR. JOHNS: So in 1979, I think.

11 JUSTICE MOELLER: Okay.

12 MR. McMURDIE: And this Court, our Arizona
13 Supreme Court, has recognized Dobert as controlling law in
14 subsequent cases.

15 MR. CARDENAS: Jose Cardenas. If the
16 changes are regarded, though, as substantive, wouldn't
17 that make a difference?

18 MR. McMURDIE: Yes. That's why we didn't
19 change the aggravators, and we didn't change the
20 mitigators, because we didn't want to make a substantive
21 change.

22 JUSTICE MOELLER: What about the standard of
23 review? That's been changed.

24 MR. McMURDIE: Well, actually, it's been
25 heightened, and that's what the courts look at. As long

1 as the procedure is a mitigant to the defendant and -- a
2 finding that has to be beyond a reasonable doubt, in my
3 estimation, would be a heightened change in the standard
4 of review.

5 JUSTICE MOELLER: Well, except that under
6 the old regime, the Supreme Court independently re-weighed
7 all these aggravators and mitigators and independently
8 decided. And under this, they must affirm, unless the
9 jury has abused its discretion, as I understand this
10 language. Is that substantive?

11 MR. McMURDIE: I don't believe it is
12 substantive on the standard review. I don't think it
13 would be substantive on a standard review from the actual
14 decision, especially since we are going to jury
15 sentencing.

16 MS. NAPOLITANO: Let me just -- then, John,
17 I will call on you. But there are -- we have to, I think,
18 keep in mind that we have several categories of
19 defendants.

20 One is the category who are on death row
21 now, but in some form of direct appeal, of which there are
22 31 -- 29 on direct appeal and 2 that are pending
23 resentencing.

24 Then we have all the others on death row who
25 are in some form of review or may have even exhausted all

1 of those procedures.

2 Then we have all the people that are
3 currently in the system either awaiting trial, in trial,
4 or awaiting sentencing.

5 Then we have people who either have not yet
6 been charged or death noticed or, you know, for the
7 future.

8 So we have to -- I think with particular
9 respect to the 31 and to the other 100 or so that are on
10 death row now, I would anticipate that those retroactivity
11 questions will be litigated very heavily. I think part of
12 the Legislature's challenge is to put into place a law
13 that will withstand constitutional muster as much as we
14 can divine what that is in these times for going forward.

15 John, you wanted to make a few comments.
16 John Stookey.

17 MR. STOOKEY: I wanted to apologize for
18 being late. I had a plea agreement this morning in the
19 East Valley that took longer than I would have thought.

20 We can certainly talk more about this. I
21 think on the issue of whether it's substantive or
22 procedural that there is a lot of work that's being done
23 on that front and questions dealing with that.

24 If you take a look at the Ring decision
25 itself, the Ring decision seems to turn on the idea that

1 we really are talking about elements of a crime, the crime
2 of capital murder, and that those elements need to be
3 found by a jury and that that kind of elemental analysis
4 has always traditionally been considered, I think, at
5 least when we talked about this in law school as a
6 substantive law matter as opposed to purely a procedural
7 matter. So I think that there will be questions about
8 that, exactly the issue that you are talking about.

9 MR. McMURDIE: I'm not giving reply. I'm
10 just pointing out that this is not the first time our
11 statute has been declared unconstitutional. It was after
12 Lockett versus Ohio. And after the Legislature made
13 changes in Lockett, they were applied retroactive to those
14 cases that were on review and also those cases pending in
15 the system.

16 MR. JOHNS: I have a question --

17 MS. NAPOLITANO: Let me just, for the
18 committee members or commission members, I know we can
19 have a debate about this, but I suspect that particular
20 point is going to be litigated and decided by the Courts.

21 MR. JOHNS: Has anyone thought about the
22 cost, then? Let's say you are right, and all of these
23 people, it's just a procedural change, and you have to go
24 back and retry anybody who is under a death sentence that
25 was illegally imposed. Has anybody thought about what the

1 impact financially would be?

2 MS. NAPOLITANO: Paul? Paul Ahler? I think
3 the Maricopa County has the greatest number of cases
4 impacted by this.

5 MR. AHLER: No. We don't have a specific
6 number, but we are preparing right now an agenda item to
7 go in and get additional resources to deal with this case.
8 So we are hoping to add several staff to deal specifically
9 with the cases that will come back for resentencing. I'm
10 not sure what the final dollar number will be, though.

11 MS. NAPOLITANO: Do you think, Paul, that --
12 is it anticipated that you will resentence every current
13 case, or are you going to look at it as a case-by-case
14 analysis?

15 MR. AHLER: Are you referring to the cases
16 that are in the system right now?

17 MS. NAPOLITANO: All the cases already
18 sentenced is what I'm talking about.

19 MR. AHLER: Of course, we don't know what
20 the Supreme Court is going to do, our Supreme Court, on
21 the 31 cases you described so, but we anticipate a number
22 of those coming back for resentencing. So we are gearing
23 up for those.

24 We plan on looking at each one of those
25 cases independently to see if we still have evidence to go

1 forward. Some of them, I think we will. Others we will
2 probably have some problems with. We may have to just
3 agree to a life sentence, but it will be on a case-by-case
4 basis.

5 MR. JOHNS: I know it's not your job to
6 advocate for the public defender's office, but as usual
7 when you go in and get more staff, we don't get any. So
8 someone ought to consider the fact that there will once
9 again be more of a lopsided resource issue that puts a lot
10 of strain on the system, and it's not just getting more
11 prosecutors. It's getting more qualified lawyers who can
12 handle these cases at the penalty phase.

13 MR. AHLER: Chris, I know this issue was
14 brought up at a justice meeting, which is Policy Makers of
15 Maricopa County, and Judge Campbell did specifically
16 indicate to Dave Smith that he thought both the
17 Prosecution and the Defense would need additional
18 resources to deal with this.

19 MS. NAPOLITANO: Peg?

20 DR. BORTNER: In terms of the -- and I don't
21 know whether we would use the term "education" or
22 "information" for jurors regarding aggravation and
23 statutory mitigation. What kind of a process would that
24 entail in terms of their need to understand the, you know,
25 what is -- what really those entail.

1 MR. McMURDIE: The way the system works is
2 simply that the jury would be limited to jury
3 instructions. So it would be -- they would be instructed
4 what constitutes an aggravator, what is the definition of
5 the mitigators, and the ultimate mitigator simply anything
6 that the jury believes is something that should call for
7 leniency.

8 MR. KIMERER: Just so I'm clear, Paul, as I
9 understand it, it would be a new jury that is being
10 selected to determine the phase, or are you using the same
11 jury? It should be the same jury, correct?

12 MR. McMURDIE: It would be the same jury,
13 unless that jury became hung at some point in time in the
14 process.

15 MR. KIMERER: Then the same jury, I take it,
16 would then be placed in a situation where they would be
17 instructed as you go into the penalty phase, so then the
18 different burdens of proof, preponderance, plus beyond
19 reasonable doubt would be given to them. That is the
20 California system now, as I understand it?

21 MR. McMURDIE: Yes.

22 MR. CARDENAS: Jose Cardenas. The first
23 part of your answer to the first question about
24 information for the jury, did you say we would give them
25 instructions that define what the different aggravating

1 circumstances meant?

2 MR. McMURDIE: Yes.

3 MR. CARDENAS: Is there any proposal to
4 develop a set of standard instructions along those lines?

5 MR. McMURDIE: There isn't. I'm not aware
6 of any right now. Obviously, until the Legislature acts,
7 it seems pretty -- I don't know. I don't want to use the
8 term "silly" to spend hours and come up with an
9 instruction and then to have the Legislature just make a
10 change, and then we have wasted all our time.

11 It seems that the natural progression is
12 that the Legislature would adopt whatever it is that they
13 are going to adopt. Then, at that point in time, the
14 State Bar Jury Instruction committee, obviously, would
15 take that up. APAAC would obviously take it up. I'm sure
16 that criminal justice groups would take it up and that we
17 would hammer out where it should go.

18 MR. STOOKEY: On that point, if I could, I
19 think that all of those steps that would obviously need to
20 be done would certainly counsel against, even when the
21 statute is passed, having an emergency clause on it that
22 says it goes into effect the next day. I'm not sure
23 anybody -- I can speak for me. I'm not going to know what
24 to do the next day. I don't think there is going to be
25 rules. I don't think there is going to be adequate

1 funding.

2 For example, under the statute, the
3 mitigation and aggravation hearing will happen, quote,
4 unquote, "immediately after the trial is over." So what
5 has traditionally been done in this state, which is that
6 we appoint two lawyers. We get a mitigation specialist
7 involved, but we all know that in reality much of the
8 aggravation and mitigation work, at least, was done after
9 the trial is over. That's not going to happen anymore.

10 They are going to have to be from Day 1
11 hitting the ground running on mitigation. That's a total
12 change with regard to how Defense is going to be done.
13 And I think probably with regard to how Prosecution is
14 going to be done. It requires training as to be able to
15 do that, I think.

16 And thirdly, it requires the money to be
17 able to do it. It really is a different system.

18 MR. JOHNS: Along that line, which was my
19 question about why you chose the word "immediately." I
20 mean, what -- are you putting any discretion in the Judge
21 at all? I mean when you say "immediately," do you mean
22 that day? The next hour?

23 MR. McMURDIE: Actually, I looked at a lot
24 of different statutes and a lot of different court rules.
25 No state that has jury sentencing allows for an amount of

1 time after the jury verdict. Some say "forthwith," some
2 say "the next morning," but there is -- "immediately" to
3 me, meaning as soon as practicable, and it doesn't have to
4 be the next second, but at some point.

5 MS. NAPOLITANO: I thought "immediately"
6 meant "forthwith."

7 MR. McMURDIE: There you have it.

8 MS. NAPOLITANO: Mike?

9 MR. KIMERER: I join in your concern about
10 the immediacy problem, because we have proven here at this
11 commission that we live in a culture where we are just
12 learning how to use mitigation specialists from the
13 beginning, and it's been one of the criticisms of the
14 system that we haven't done that. So our culture is
15 programmed to have this delay.

16 So under the present system, we are going to
17 have to do it immediately, and we are just not equipped, I
18 don't think, to do that right away until we get some
19 things in place. That's the reason I asked the question
20 about the different steps.

21 We are talking about really a huge change in
22 the system and how we are going to operate in a murder
23 case, and I just don't think it's something you just
24 blindly rush into and the next day start deciding death
25 penalty on the basis of what the Legislature is going to

1 do tomorrow. It's something we need to think through
2 carefully.

3 MS. YANKOWSKI: Maybe I missed this, or
4 maybe Harold addressed this already, but are there other
5 states that have this provision for a retrial if there is
6 a nonunanimous -- and has that been held constitutional by
7 the Supreme Court?

8 MR. McMURDIE: Yes and yes. There are other
9 states that do that and -- the US Supreme Court, I don't
10 know if it has ruled on the issue, but all of the circuit
11 courts have ruled on the issue that it's all right.

12 MS. YANKOWSKI: But the United States
13 Supreme Court hasn't ruled on it yet?

14 MR. McMURDIE: Not that I'm aware of.

15 MR. STOOKEY: I think that Paul exactly
16 stated the law correctly on this issue, but I think
17 particularly one of the things we all ought to be thinking
18 about is, is this good public policy when it comes to a
19 death penalty statute, whether it's constitutional or
20 unconstitutional.

21 Think about this, or at least I have thought
22 about it. In an era when we are concerned about wrongful
23 convictions, we are concerned about people being
24 wrongfully sentenced to death like Mr. Crone (phonetic),
25 does it make any public policy sense to say that when the

1 first jury that heard the whole case can't unanimously
2 find death, that we are going to send them home and bring
3 in another jury? And if they can't find unanimously death
4 or unanimous life, we are going to send them home and
5 bring in another jury? I think that's an invitation for
6 wrongful sentences.

7 And certainly, there are states in the
8 country that would say if the first time around you can't
9 be unanimous about death, then it's life. That's the
10 default option.

11 The other aspect is, as a taxpayer, I can't
12 figure out how in the world -- how much that's going to
13 cost, because I know, and I know my colleagues here, if we
14 have to go to a second jury, that's going to be a whole
15 new trial, because this is going to be a jury that has
16 never heard anything before. It's not going to be a
17 simple mitigation hearing or aggravation hearing. It's
18 going to require us to educate that jury.

19 Plus, I think it's going to be a strange and
20 wonderful thing to figure out how we are going to
21 voir dire that new jury given that the media will have
22 already covered the trial and the original sentencing
23 outcomes. So, again, I think we ought to think about
24 this, not simply as a constitutional matter, but as a
25 public policy matter. Given what we learned about the

1 death penalty in Arizona, is this something we think is a
2 good idea?

3 MR. CARDENAS: Paul, Jose Cardenas again. I
4 have two questions. The first one may have been answered
5 by John Stookey, and that is, are there states whereby
6 statute a hung jury on death means a life sentence?

7 MR. McMURDIE: Yes. As I indicated earlier,
8 there are.

9 MR. CARDENAS: Then second, the elimination
10 of independent review by the Supreme Court, is that based
11 on the California statute?

12 MR. McMURDIE: No state has independent
13 review other than Arizona.

14 MR. CARDENAS: Okay.

15 JUSTICE MOELLER: Paul, I'm wondering with
16 respect to the effort to make this statute retroactive to
17 these 31 or maybe even possibly more, instead of
18 prospective only, I'm wondering has any attempt been made
19 to discuss it with victims or organizations that represent
20 victims. Some of these people have been in litigation now
21 for 5, 10, 15, probably 20 years. And if this is
22 attempted to be made retroactive, they will be buying into
23 another generation of litigation, even if it's completely
24 legal. My question would be, have any of them been talked
25 to? There might be some that would not be very interested

1 in it at this point.

2 MR. McMURDIE: There has been discussions
3 with victims' groups. I haven't heard any victims' groups
4 that were in favor of simply allowing those people that
5 have already been sentenced to death to get a life
6 sentence.

7 JUSTICE MOELLER: But there have been
8 discussions with victims' groups?

9 MR. McMURDIE: Oh, many.

10 JUSTICE MOELLER: Has it been explained to
11 them that this is very problematic legislation that will
12 result in God knows how many years of litigation?

13 MS. NAPOLITANO: If I might interject, don't
14 you think -- and Paul, McMurdie or Ahler, tell me if I'm
15 wrong, but don't you think that there will be, with
16 respect to each individual case, some discussions through
17 the victim witness offices, either in our office or yours,
18 with the actual survivors as part of the decision making
19 process on how to proceed with the case?

20 MR. AHLER: Absolutely. That's a factor we
21 take into consideration on every case. We are already
22 getting calls from victims on death row inmates wanting to
23 know what will happen in their case. So all I can say is
24 from our perspective, Maricopa County, we are going to be
25 looking at each case individually to see if we have

1 sufficient evidence, and if it should go forward with a
2 new sentencing on those cases.

3 I also wanted to point out -- Paul, please
4 correct me if I'm wrong, but I think the legislation also
5 requires that if the jury hangs a second time, then the
6 Court then has the option to give a life sentence.

7 MR. McMURDIE: That's correct.

8 MR. AHLER: Okay. I think that's under
9 Subsection G, but I'm not sure what -- 70304.

10 MS. NAPOLITANO: Other questions, thoughts?

11 MR. STOOKEY: I would like to pass around
12 some issues that I think are relevant to our discussion on
13 this. I think we have talked about issues of how the
14 statute is structured itself, but from my perspective, one
15 of the biggest concerns with this statute is what is not
16 in it, and what appears to not have been thought about
17 with regard to how the structure -- how the statute ought
18 to be structured.

19 I, simply, for my thoughts have tried to lay
20 down some things that I guess I would like to have us
21 consider in terms of whether this is a statute that is
22 appropriate or inappropriate, whether it needs changes or
23 not. Again, not simply in terms of what is in there, but
24 what is not in there.

25 We talked a little bit about it, and I tried

1 to lay out some issues that made sense to me that I
2 thought we ought to evaluate this statute, recognizing
3 that simply going from judge sentencing to jury sentencing
4 is not as easy as just plugging in the word "jury" every
5 place the word "judge" used to be. It's a complex set of
6 questions, and I tried to outline what I thought were some
7 of the complexities. We ought to try to ask ourselves
8 whether this new system is going to increase or decrease
9 what we already have as a pretty high reversal rate. What
10 do we think is going to be the consequences of that?

11 I think we also need to evaluate it from a
12 perspective of, is it going to increase or decrease the
13 potential problems with regard to wrongful sentences, and
14 then how much is it going to cost?

15 Again, on pages 1 through 3, I laid out some
16 issues that I would like to propose that our commission
17 look at, that we talk about. I think we are uniquely
18 assembled to address these questions. I don't know what
19 the right answers are. I just think we ought to look at
20 these, and that given the knowledge we have all
21 accumulated over the last two years, that we ought to
22 share that knowledge with the Legislature before it makes
23 a decision about how to proceed.

24 So on the complexity issue, for example, I
25 think we do need to take another look at the cruel,

1 heinous, or depraved aggravator, and ask whether it needs
2 to redefined in the context of jury sentencing, or can it
3 be handled by jury instructions? Does it need a new
4 statutory definition?

5 Illinois, for example, came to the
6 conclusion in their commission that they needed to
7 narrowly define that term for the jury, because that was a
8 source of great error. We have data to talk about that
9 issue. Again, not so much of what was the old system, but
10 is this new system going to make it worse or make it
11 better?

12 Similarly, the statute assumes that the jury
13 should do the actual sentencing. Maybe that's right, but
14 that's not what Ring says. You don't have to do it that
15 way. You could have a system, for example, where the jury
16 recommended, under Ring, the sentence. If the jury
17 recommended life, that's the end of the story. If the
18 jury recommended death, the Judge could reevaluate it.

19 Alternatively, if you wanted to, you could
20 have a system under Ring where all the jury did was find
21 aggravators, and then the Judge did all the weighing and
22 the ultimate sentencing. Again, should we do it that way?
23 I don't know, but I would like for us to talk about it.

24 Does the Enmund Tison felony-murder rule
25 have to be found by a jury? We don't address that. I

1 think, if you look at the way Ring was argued it, it was
2 purposely not dealt with because of the legal strategy in
3 that case, but certainly Justices on the court indicate
4 that they are going to be considering Enmund Tison again
5 in the next year. I think there is no doubt of that. So
6 if we don't think about this, we may be structuring a new
7 statute that may be found unconstitutional again.

8 People have said repeatedly that they are
9 worried about juries being more inconsistent than Judges.
10 If that's a worry, why wouldn't we put proportionality
11 review into the statute and try to address that issue?
12 Let's talk about that.

13 We talked about the jury rules here. We
14 have talked about the appellate review. We haven't talked
15 about this statute doesn't put aggravators into the
16 indictment. As most of you know, the United States
17 Supreme Court accepted the Alan case two weeks ago where
18 they are going to address that very issue in post-Ring
19 terms as to whether the indictment needs to contain
20 aggravators or not. It's under the Federal statute, but
21 it's a due process argument that can have equal
22 applicability to states.

23 Then this whole issue of the retroactivity.
24 Again, I would urge and have us think about each of those
25 issues. What does the statute do with regard to

1 reversals? We know what our reversal rate is. Our
2 commission has told us. Our data that Dr. Bortner has
3 collected is that we have a 50 percent reversal rate. Of
4 the 228 people sentenced to death in Arizona since 1973,
5 50 percent of them have had their conviction or their
6 sentence reversed at least once. Is this going to be a
7 statute that is going to make that number worse or better?
8 I think we ought to think about that.

9 Avoiding wrongful convictions. We know
10 Crone was wrongfully convicted. We have data here that we
11 have produced that deal with individuals that have been --
12 had their convictions overturned. We can dispute or talk
13 about whether that means they are innocent or not.

14 Again, Illinois, in response to that, went
15 to a very different kind of system. They narrowed
16 aggravators. They did other things to try to eliminate
17 error. We haven't done any of those things.

18 Then, finally, the fiscal impact. The
19 moral, I guess, of my story is, I don't know at this point
20 whether this is a good or a bad statute, because there are
21 so many issues that we haven't considered, and I would
22 hope that we would.

23 MR. CARDENAS: This is Jose Cardenas. I
24 would join in the suggestion, and I can tell you that I'm
25 very troubled that we would not define aggravators and at

1 the same time limit Supreme Court review, the abuse of
2 discretion.

3 And I think at a minimum, we would want to
4 follow -- this is a different point. We would want to
5 follow the lead of the states that have by statute said
6 you get one shot, that prosecution does with a death
7 sentencing. If the jury is hung, that means life.

8 MS. NAPOLITANO: I think it's fair to say
9 there is disagreement around the table about some of this.
10 I think the question for us is how we wish to proceed,
11 because in the world out there, this train is going to
12 leave the station fairly quickly, in part, because it is
13 my understanding that a number of defendants are now
14 pushing for their speedy trial and sentencing rights to
15 take advantage of the fact that the current statute has
16 been disallowed. So that in and of itself requires us to
17 act with all deliberate speed, but I agree with you, John.
18 There are lots of issue here underlying the statute.

19 Here is what I would propose that we do.
20 Let's see if it meets with the commission's approval.
21 Obviously, some of us have been deeply immersed in Ring
22 issues for a while, and some of us have been lucky enough
23 not to be deeply immersed in Ring issues for a while.

24 Some of us have really thought about the
25 role of the jury. And I think that the point that was

1 made about you have to be ready to try your case and your
2 sentencing on the first day your trial begins is a major
3 change in this state. No longer will you have that big
4 delay between conviction and sentencing. If you are going
5 to keep the same jury, you really need to move
6 forthwith -- which is a word I really like, by the way.

7 What I would suggest that we do is -- and in
8 light of the fact that some people were not able to be
9 here today, is for me to circulate in writing kind of just
10 a facts ballot to take the sense of the commission, asking
11 some fundamental questions.

12 Do you believe that we should have, what I
13 would call, pure judge sentencing or some kind of a hybrid
14 system where the jury makes a recommendation and the judge
15 passes sentence? Do you believe that there should be a
16 bounce back to another jury? Should there be a hung jury
17 in the first instance? Do you believe that statutory
18 definitions need to be changed, or can some of these
19 things be dealt with through jury instruction? What
20 practical problems, if any, do you see with the proposed
21 bill? What changes would you make to it?

22 Then collect all of those and make all of
23 that information available to the Legislature, so that we
24 use the commission as a way to funnel the views of the
25 various stake holders here to the Legislature, not by any

1 means suggesting that you can't go to the Legislature
2 yourself or through your own groups, but simply to see
3 what the temperature of the group is. Is that acceptable
4 to everybody?

5 MR. JOHNS: Yes, to me.

6 MS. NAPOLITANO: In fact, we have a meeting
7 of the commission that was set for, I believe, a week from
8 today, if I'm not mistaken, which was to take up some of
9 the more policy-oriented issues arising from the data.
10 And if we could circulate kind of this straw ballot and
11 have it by the end of the week, we can make the results
12 known to you by Monday, if that would be acceptable to
13 everybody.

14 Lee?

15 MR. STEIN: I guess my concern is that -- I
16 wonder what the value of the straw ballot is, except sort
17 of just giving numbers of what people think about these
18 issues without us having the opportunity to talk about --
19 I mean, this is the first time this body has considered
20 the issue of a jury hearing, the sentencing phase. And
21 without having the opportunity to see what the experience
22 has been in other states and to talk about it, I wonder
23 what the value of that is. I understand the pressure of
24 the Legislature is going to move whether we move with them
25 or not. I don't quite know how to accommodate those two

1 things except I'm not sure what we will learn.

2 MS. NAPOLITANO: Do your research quick, I'm
3 telling you.

4 MR. STEIN: I wonder whether a smaller group
5 of this body could get together and try to address some of
6 these issues in short order.

7 MS. NAPOLITANO: Well, I think -- and
8 Judge Cole, tell me if I'm wrong, but some of these issues
9 were discussed earlier this year.

10 JUDGE COLE: Sure. Yes.

11 MR. CARDENAS: Jose Cardenas again. Two
12 things, one with respect to your last comment. I think
13 some of these issues were discussed, but I think they take
14 on a whole different shade when we are talking about this
15 in the context of jury sentencing and, specifically, the
16 aggravators.

17 Second, I just want to clarify. Are you
18 suggesting that the commission itself would not formerly
19 take a position on what we should do and that in lieu of
20 that, you simply would share with the Legislature what the
21 thoughts of the individual members of the commission are?

22 MS. NAPOLITANO: Jose, what I'm suggesting
23 is something short of that, and that is to see whether the
24 commission indeed has a view, or whether there is any room
25 for consensus in the commission at all, or whether we are

1 splitting into fractions.

2 What I'm suggesting is, rather than take
3 votes today, which I don't believe the members are
4 prepared to do, we try to do that by fax or e-mail, what
5 have you, so that we can get a sense as to is there a core
6 of agreement on some principles and a core of disagreement
7 on others and then proceed to the Legislature, if we can.

8 MR. CARDENAS: If, for example, you come up
9 with a core of agreement on the procedure with respect to
10 impaneling new jurors. Let's say the majority of the
11 commission says that that's not a good idea. Would that
12 be presented to the Legislature, then, as a recommendation
13 of the commission?

14 MS. NAPOLITANO: I think what we would do,
15 Jose, is yes, but it would be like the other
16 recommendations of legislation where if there has been a
17 dissent, we also make the dissent available to the
18 Legislature.

19 MR. CARDENAS: I would just think at a
20 minimum, we should try as a commission to see if we can't
21 come to at least a majority agreement on all of the issues
22 that John raised.

23 MS. NAPOLITANO: Well, I think some of the
24 issues I would suggest are really broader than the Ring
25 issue itself, but I do think we can put together a list of

1 some fundamental questions and see where we are at.

2 Tom?

3 SENATOR SMITH: It appears to me that it
4 would be much better to come to the Legislature with some
5 type of consensus focused on the Ring decision, because if
6 you come to the Legislature and say, "Here is all the
7 problems. Solve it for us," you don't know what the heck
8 is going to happen.

9 So there should be some type of agreement on
10 a bill that's been posed. You have got a much better
11 chance of getting something through that everybody can
12 live with. I think that's what we are aiming for.

13 Again, keep it focused on what happened with
14 the Ring decision, how we can implement within the State
15 of Arizona, not broaden it out to extemporaneous issues.

16 MS. YANKOWSKI: This may not be politically
17 popular, but I would also like to see included in this fax
18 a question to each of us about whether we think that Ring
19 can be solved in terms of pending cases. Is it possible
20 to go back and do what this Legislature is proposing to do
21 now, in other words, solve all of these issues with
22 respect to the cases that have already been sentenced
23 under a scheme, which has just been found to be
24 unconstitutional?

25 MR. KIMERER: One of my concerns is that I

1 think the value of this commission is that it's been a
2 body of people that reflect the sentiment and the feelings
3 and the values in the community of people in an area, so
4 when this committee does come up with some kind of an
5 opinion, it's a pretty good cross-census, and it's been
6 studied and looked at, and it carries some weight.

7 I'm afraid given this situation that we have
8 with the problems that we see that are coming out of the
9 Ring case, that all of a sudden we are just racing to come
10 up with some kind of judgment for the Legislature, because
11 they have to rule. I think we hurt our credibility in the
12 long run if we just try to shoot something to them so we
13 can give them something from the commission.

14 A lot of these problems are really
15 significant problems. Like Jose said earlier, just
16 because we look at some of these things, I'm starting to
17 think, well, boy, we have to go back and rethink some of
18 our decisions in light of throwing it out at the jury,
19 because it throws a whole new variable in the way cases
20 are tried and handled that we really need to take a look
21 at.

22 I think we need to come with a
23 well-reasoned, thought-through decision from this
24 commission, and not something we just throw together,
25 because the Legislature is going to act right away.

1 MS. NAPOLITANO: Jim?

2 MR. BUSH: Has anybody given any thought at
3 the upper level of what is going to happen if the
4 Legislature can't agree? I mean, you know, this is
5 election time. I can't imagine that many of these people
6 want to consider this issue let alone stand up and vote on
7 it. They had a hell of a time with the budget. That's
8 chicken feed compared to this from a political standpoint,
9 in my opinion.

10 I don't think there is going to be a lot of
11 thrills in candidates' minds about meeting to vote on this
12 issue. It is complicated. It has already been said, you
13 know, it's -- I guess if I were the present governor, I
14 don't know that I would want to call these people into
15 session and have them sitting around not able to agree
16 again.

17 What is wrong with the notion that this
18 matter is so complicated -- it isn't a question about
19 whether we are going to vote against capital punishment or
20 not, although that's going to enter into it. That's going
21 to be part of it. It isn't that simple. If it was that
22 simple, you would send it to the people, because that's
23 something that they could vote on.

24 It seems to me that as complicated as it is,
25 there is some merit in her saying that this matter needs

1 to be postponed until we get a new Legislature who are
2 going to be there, the people who are elected, and that
3 this body, or some body, comes up with some specific
4 recommendations.

5 If you ask me, I don't have any objection to
6 what you proposed as far as sending out things, but I'm
7 certainly not an expert at it. And I guess -- I don't
8 know how good my views would be in one week on some of
9 these questions, but I guess I'm -- what is the harm in
10 saying, "We are not going to consider this right now. We
11 are going to postpone this bill until new legislature
12 comes in"?

13 MS. NAPOLITANO: Paul?

14 MR. AHLER: I certainly agree that we have
15 to have something that withstands constitutional muster,
16 but there is an urgency to this, and it's not just the
17 guys that are on death row right now, which is 130. We
18 have right now in Maricopa County alone, 52 cases that are
19 death alleged pending trial. We have 10 that have been
20 convicted that are pending sentencing, and we need some
21 guidance on what to do with these cases. We can't wait
22 for six months or a year for the Legislature to answer
23 this issue. We need an answer quickly.

24 MR. BUSH: I hadn't thought of that. I was
25 thinking of people that are on death row that have already

1 been convicted. I understand. That is a problem.

2 MR. HASTINGS: I would just echo what Paul
3 just said. We have been at this for two years now. We
4 can't wait another two years. Last week we had one case
5 that the Judge continued, because of the decision, that
6 was set for trial. There is some urgency here.

7 MS. NAPOLITANO: Let me ask -- Ken Catani
8 (phonetic) is in the back. Have you had a chance to talk
9 with the capital litigation units in the other states that
10 also disallowed under Ring?

11 MR. CATANI: I have spoken to two or three.
12 They are in the same process, coming up with legislation.

13 MS. NAPOLITANO: And are those states
14 planning upcoming special sessions to deal with the Ring
15 issues?

16 MR. CATANI: One state is, but they didn't
17 have any specifics.

18 MS. NAPOLITANO: John?

19 MR. STOOKEY: I just think that it would be
20 sad if this group, which I have so much respect for after
21 for two years and diversity of views, didn't have the
22 opportunity to fully weigh in on these important issues
23 before we went to a new system -- weigh in in a meaningful
24 way. I understand the pressures, as well, but I don't
25 think we can meaningfully do that in a week. So I would

1 just respectfully ask that we try to take advantage of the
2 perspectives. There are many people around the table that
3 I don't know what they think. For example, Steve is not
4 here today. I don't know what the victims' community
5 thinks about some of these issues. I'd like to know that.

6 MS. LELAND: This is Gail Leland from
7 Tucson, Arizona.

8 MS. NAPOLITANO: Hi, Gail.

9 MS. LELAND: Hi. I have a meeting scheduled
10 for this month with victims, those that have cases that
11 are pending sentencing that were on hold because of Ring,
12 others awaiting trial, others that the defendants are on
13 death row.

14 So there is a lot of concern and a lot of
15 confusion right now. Victims right now want answers on
16 how this is going to impact their particular case. I
17 think their main concern, their most urgent concern, is
18 that the -- that they don't want the sentences of those
19 that are on death row just to be commuted. They don't
20 want this to be a decision made because of money, and they
21 don't want to keep going through this, but it doesn't seem
22 to matter whether it's this issue or another one. Appeals
23 just seem to be part of -- one of the things that victims
24 have to endure in capital cases.

25 So I don't get the feeling that they just

1 want to say, "Oh, well, just forget it. Give them life,
2 because this is too hard." They want justice. And I will
3 be willing to share any information after we have this
4 meeting with our Tucson families.

5 MS. NAPOLITANO: Senator?

6 SENATOR SMITH: I would like to reemphasize
7 again that when this issue comes to the Legislature, it
8 should be with a united front. If there's a lot of
9 dissension among the legal community about what to do, it
10 being an election year, as Jim has said, it's going to be
11 an impossible task to get a bill through the Legislature.

12 I think if they can say, "This came to us
13 from the legal community, and it's got the support of the
14 legal community, we can get it through," I think when they
15 call a special session, it's going to be with the
16 understanding they have got the votes in order to get the
17 bill through.

18 MS. NAPOLITANO: Yes. I believe the
19 Governor has asked that whenever they have a special
20 session is to see if they have enough in the emergency
21 fund provision as well as anything else.

22 Let me say, given all these very erudite
23 comments on a very complicated issue, in the realities of
24 some time constraints, because of the pending cases in the
25 Superior Courts in large part, let me tender another

1 suggestion to the commission, and that is, that the bill
2 before you now was a bill that APAAC endorsed unanimously
3 last week, that we refer the bill to the trial committee
4 to examine and report back to us next week so that we --
5 we already have a scheduled meeting of the commission on
6 the 15th with whatever recommendations the trial committee
7 would have on the bill and put that in a form so that the
8 full commission could discuss it, and if not vote,
9 schedule a time for a vote.

10 What do people think about that? So then
11 there is time for a little bit more in-depth discussion of
12 some of the issues that have been raised. Also I think
13 every day we learn more and more about what is going on in
14 different states, and that's always helpful knowledge.

15 MR. JOHNS: A week from today? A week from
16 today, you are saying?

17 MS. NAPOLITANO: Well, the reason I say
18 that, Chris, is because we had scheduled a meeting on the
19 15th anyway to go through the latest data and also to look
20 at a host of public policy things.

21 My suggestion is that since we already have
22 that scheduled we take advantage of that time, because I
23 do not believe that we have months to study this issue. I
24 just -- I have done a fair amount of phone calling around
25 to see what kind of time we had. I just don't think we

1 have much time.

2 MR. KIMERER: Could the directive be just to
3 focus in on this bill here and our thoughts about the
4 proposed bill?

5 MS. NAPOLITANO: I think the bill gives you
6 a good -- yeah, because that way you could focus a
7 discussion on do you want hybrid or pure jury sentencing?
8 Do you think there are issues with the bounce back
9 provisions of the bill? What about the standard review
10 issue that has been raised?

11 MR. JOHNS: What about proceeding on both
12 levels? I mean, also doing your e-mail and/or the fax
13 poll as well as having the committee look at it? One of
14 the problems is, for me anyway, I will be gone most of the
15 week and won't be back until Sunday. So it gives me
16 limited opportunity to get some in-put in, but what about
17 doing both things as well?

18 MS. NAPOLITANO: We can do that. We can do
19 that.

20 MR. JOHNS: So that there is a double
21 opportunity to everyone to participate as well as the
22 trial committee and anyone who wants to attend that
23 meeting, but also do the straw poll.

24 MS. NAPOLITANO: To see what the temperature
25 is.

1 MR. JOHNS: Yes.

2 MS. NAPOLITANO: Judge Cole, is that
3 something you think could be pulled together?

4 JUDGE COLE: I don't mind giving that a try.
5 Frankly, though, I don't know that I would want to limit
6 the discussion just to the bill. I think I would want to
7 go ahead and wrestle with some of the questions that John
8 raises. Since I anticipate him being there, he will
9 probably want us to do that.

10 I can try to put this together. I can't
11 tell you given people's vacation schedules, and so forth,
12 how much luck we'll have, but I'm willing to try.

13 MR. CARDENAS: In the states that have
14 declared moratoriums, specifically Illinois, had that just
15 been on carrying out executions, or has it extended beyond
16 that?

17 MS. NAPOLITANO: I don't know the answer to
18 that. Does anybody know or, Paul, do you know?

19 MR. CATANI: It's just been in carrying out
20 the executions. They continue to impose death sentences.

21 MS. NAPOLITANO: Jose, the answer is, it's
22 just on the executions. They continue to impose sentence.

23 MR. CARDENAS: Okay.

24 MR. STEIN: I guess a modification to your
25 suggestion would be that the issues get split up among the

1 different groups, because I think this is too much for one
2 group to handle, for the trial group. Maybe the Attorney
3 General's office or somebody else can sit down and take a
4 look at it so we have got the benefit of the whole
5 commission working on it -- and that we use the meeting
6 next week as a discussion meeting to report back, and we
7 can schedule another meeting after that shortly, within a
8 week after that or some short period after that, where we
9 can come to some sort of an agreement on where we are
10 going.

11 I just feel that if we just have the trial
12 group trying to digest and make recommendations on this in
13 a week, and then have people be able to make a reasoned
14 judgment based on that discussion, next week is going to
15 be just too much.

16 MR. STOOKEY: Mine is a similar friendly
17 amendment as to whether we might be able to use the time
18 that was scheduled next week to have this meeting, but
19 invite anybody who wants to come. Then have the general
20 meeting in a week or two down the road after that, because
21 people we know are going to be free next Monday, so at
22 least we can get people together.

23 MS. NAPOLITANO: Well, dang. Here is what I
24 suggest we are going to do in light of all these friendly
25 amendments. I'm going to ask Judge Cole to convene his

1 committee. We will notice everybody on the commission,
2 and anyone who wants to go can go to see if they can make
3 or bring to the table any recommendations as to what they
4 have at least consensus on versus what they don't have
5 consensus on.

6 We will hold and reserve whether we need to
7 have yet another meeting beyond the 15th, because we may
8 indeed have some basics of a consensus. We may be able to
9 hold some of the issues that John in particular has raised
10 for later on for the regular session of the Legislature,
11 because the Governor's call, I believe, will be very, very
12 narrowly drafted only to deal with procedural issues
13 arising from Ring, because she wants to get out of special
14 session, too, and if you open up the whole capital
15 punishment area, they could be there for a long time. So
16 we will ask the trial committee to meet.

17 Judge Cole, do you have a time when you
18 think you could call that meeting and a place?

19 JUDGE COLE: This is my vacation week. I'm
20 available the whole week.

21 MS. NAPOLITANO: Okay.

22 JUDGE COLE: How about Friday afternoon?

23 MS. NAPOLITANO: Yes. That's always good
24 for attendance in the summer. Is that going to be up in
25 Flagstaff?

1 JUDGE COLE: We don't have the money to go
2 to Flagstaff.

3 MS. NAPOLITANO: Could you meet as soon as
4 Wednesday?

5 JUDGE COLE: Depending on people's
6 availability, sure.

7 MS. NAPOLITANO: Diane, why don't we -- what
8 we will do is see if we can block out a time and e-mail
9 everybody with the time and place. Then we will reconvene
10 here a week from today. In the meantime this week, I will
11 put together a straw nonbinding ballot. Okay?

12 Then we know for sure, then, if we use the
13 15th to do Ring follow-up, we are going to have to have at
14 least one more full meeting of the commission to go
15 through the data, to go through what we were originally
16 going to do on the 15th. Okay?

17 So there we are. Thank you all. Anything
18 else anybody wants to add? Everybody content with that as
19 a way to move this along in fairly rapid way?

20 All right. Thank you all.

21 (11:14 a.m.)

22

23

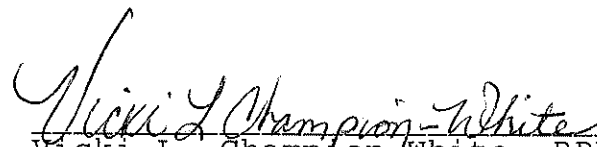
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C E R T I F I C A T E

I HEREBY CERTIFY that the proceedings had upon the foregoing hearing are contained in the foregoing 49 pages constitute a full, true, and correct transcript of said shorthand; all done to the best of my skill and ability.

DATED at Phoenix, Arizona this 9th day of July, 2002.


Vicki L. Champion-White, RPR
Certified Court Reporter
No. 50534